Supreme Court, U.S.
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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1996

OCALA STAR-BANNER CORPORATION AND THE NEW YORK TIMES COMPANY,

Petitioners,

vs.

BERNARD F. McNELY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a plaintiff bringing a claim for disparate treatment under the Americans With Disabilities Act, must prove, as part of their *prima facie* case, that the adverse employment action complained of was based "solely" because of their disability.

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed here appear in the caption of the case. The Ocala Star-Banner Corporation has no subsidiaries; its parent company is The New York Times Company. The New York Times Company has no parent company but has the following subsidiaries and divisions:

- The Boston Globe;
- The Courier;
- Cruising World;
- Daily Comet;
- Daily World;
- Donohue Malbaie, Inc.;
- The Gadsden Times;
- Gainesville Sun Publishing Company;
- Lake City Reporter;
- The Dispatch;
- Golf Digest;
- Golf Shop Operations;
- Golf World;
- International Herald Tribune;

- International Operations;
- KFSM-TV;
- KHNT-TV;
- The Ledger;
- Madison Paper Industries;
- Marco Island Eagle;
- NYT Business;
- NYT Business Information Services;
- NYT Custom Publishing;
- NYT Event/Sports Marketing;
- NYT Shared Services Center, Inc.;
- NYT Specialized Publications/Times Fax;
- NYT Video News International;
- NYT Video Productions;
- The New York Times;
- The New York Times Index;
- The New York Times News Service;

- The New York Times Regional Newspaper Group;
- The New York Times Syndicate;
- The New York Times Syndication Sales Corp.;
- News-Leader;
- The News-Sun;
- Ocala Star-Banner Corporation;
- Palatka Daily News;
- The Press Democrat;
- Sailing Business;
- Sailing World;
- Santa Barbara News-Press;
- Sarasota Herald-Tribune;
- Snow Country;
- Snow Country Business;
- Spartanburg Herald-Journal;
- Special Services;
- Tennis;

- Tennis Buyer's Guide;
- Times On-Line Services;
- TimesDaily;
- Times-News;
- The Tuscaloosa News;
- WNEP-TV;
- WQAD-TV;
- WQXR(FM) & WQEW(AM);
- WREG-TV;
- WTKR-TV; and
- Wilmington Morning Star.

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Petitioners, Ocala Star-Banner Corporation ("Star-Banner") and The New York Times Company ("The Times"), respectfully pray this Honorable Court to issue a writ of certiorari to review the Judgment and Opinion of the United States Court of Appeals for the Eleventh Circuit entered on November 20, 1996, in order to resolve the conflict between the Eleventh Circuit, on the one hand, and the Fourth, Fifth, Sixth, Seventh and Tenth Circuits, on the other, on the important issue presented herein.

OPINIONS BELOW

The Opinion of the Circuit Court of Appeals for the Eleventh Circuit which gives rise to this Petition is reported at *McNely v. Ocala Star-Banner Corporation*, 99 F.3d 1068 (11th Cir. 1996), and is reproduced in the Appendix ("App.") filed herewith at App. A, pages 1a-23a. The Judgment of the United States District Court for the Northern District of Florida is unpublished, but is reproduced at App. B, pages 24a-25a.

STATEMENT OF JURISDICTION

The Judgment sought to be reviewed was entered by the United States Court of Appeals for the Eleventh Circuit on November 20, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The statutes involved in this case are the Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101, *et seq.* ("ADA"), the Rehabilitation Act of 1973, 29 U.S.C. §§ 701, *et seq.* ("Rehabilitation Act"), and Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e, *et seq.* ("Title VII"). The pertinent sections of these statutes are reprinted at App. D, pages 29a-43a.

STATEMENT OF THE CASE

On or about April 6, 1994, Respondent Bernard F. McNely ("McNely") commenced the underlying action against Star-Banner and The Times for disability discrimination and retaliation under the ADA. The claims which McNely asserted in his Complaint arose from his former employment with Star-Banner, a company owned by The Times and which publishes the "Ocala Star-Banner," a daily newspaper circulated in the Ocala, Florida area. McNely was formerly the Night Supervisor of the newspaper's Camera Department.

From August 2 – 8, 1995, McNely's claims were tried in Ocala, Florida, before The Honorable Maurice M. Paul, Chief Judge of the United States District Court for the Northern District of Florida. After five days of trial and more than seven hours of deliberation, a seven-person jury returned, on August 8, 1995, a unanimous verdict in favor of Star-Banner and The Times and against McNely. App. C, pages 26a-28a. The following day, August 9, 1995, the District Court entered Final Judgment in accordance with the jury's verdict. App. B, pages 24a-25a.

On September 7, 1995, McNely filed a Notice of Appeal to the Eleventh Circuit Court of Appeals. In his appeal to the Eleventh Circuit, McNely asserted, *inter alia*, that the District Court committed legal error when it required the jury to answer the following questions in the jury verdict form:

> 5. Do you find, by a preponderance of the evidence, that Plaintiff has proved that he was terminated solely because of his alleged disability?
>
> Yes __ No __

* * *

> 6. Do you find, by a preponderance of the evidence, that Plaintiff has proved that he was terminated solely because he engaged in a statutorily protected expression?
>
> Yes __ No __

App. C, pages 27a-28a.[1]

More specifically, McNely complained on appeal that the District Court: (i) improperly required the jury to find, as a prerequisite to liability, that McNely had been terminated "solely" because of his disability; and (ii) too narrowly framed as "termination" the adverse employment action which McNely alleged he suffered in the underlying cause.

In response, Star-Banner and The Times argued that the District Court's adoption of the "solely" liability standard was correct — as opposed to the Title VII standard advanced by McNely — because the "solely" standard: (i) is the one utilized in cases arising under the Rehabilitation Act, which served as a statutory model to the ADA; and (ii) has been adopted by numerous circuits as the prevailing liability standard in ADA cases. Further, Star-Banner and The Times urged that the District Court's use of the term "termination" was proper because the adverse employment action of which McNely complained in the underlying action was his termination.

On November 20, 1996, the Eleventh Circuit issued an Opinion, reversing the Final Judgment of the District Court and

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1. The jury answered "No" to questions 5 and 6 of the jury verdict form.

remanding the case for a new trial. In its Opinion, the Eleventh Circuit agreed with McNely's contentions and held, *inter alia*, that the District Court utilized in the jury verdict form the wrong ADA liability standard and too narrowly framed the nature of the adverse employment action allegedly suffered by McNely.

Notably, with respect to the issue concerning the appropriate liability standard under the ADA, the Eleventh Circuit wrote that it was departing from precedent in other circuits in arriving at its conclusion that the District Court had adopted the incorrect ADA liability standard. The Eleventh Circuit, after outlining its interpretation of the relevant legislative history, stated, in pertinent part:

> Despite the plain language of the ADA, its legislative history, and the Supreme Court's interpretation of identical causal language in Title VII, the defendants argue that we should nonetheless interpret "because of" to mean "solely because of." They contend that precedents from the Fourth, Fifth, Seventh and Tenth Circuits support that interpretation, and point us to *Doe v. University of Maryland Medical Sys.*, 50 F.3d 1261 (4th Cir. 1995); *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995); *Rizzo v. Children's World Learning Ctrs.*, 84 F.3d 758 (5th Cir. 1996); *Despears v. Milwaukee County*, 63 F.3d 635 (7th Cir. 1995); and *White v. York Int'l Corp.*, 45 F.3d 357 (10th Cir. 1995). ***Even if all five of those cases from four other circuits had actually held that "because of" means "solely because of" under the ADA, we would still part company with those circuits***, because we are firmly convinced that such

> an interpretation is contrary to the language of the statute and the intent of Congress. . . .

App. A, page 18a (emphasis added).

The Eleventh Circuit's decision below, and the diverging opinions of other circuits, give rise to this proceeding.

REASONS FOR GRANTING THE WRIT

I.

THIS COURT SHOULD GRANT THE PETITION TO RESOLVE A CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS, AND BECAUSE THE CIRCUIT COURTS HAVE DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

A. The Decision Of The Eleventh Circuit Concerning The Appropriate Liability Standard Under The ADA Is In Conflict With Decisions Of The Fourth, Fifth, Sixth, Seventh And Tenth Circuits On The Same Important Matter.

The pivotal issue before the Eleventh Circuit — and now before this Court — concerned the nature of the liability element of a plaintiff's *prima facie* case in an action for disability discrimination under the ADA.[2] Specifically, the Eleventh Circuit

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2. It is well-settled that the first two elements of a plaintiff's *prima facie* case in an action for disability discrimination under the ADA are: (i) that the plaintiff has a disability; and (ii) that the plaintiff is otherwise qualified for the employment or benefit in question. *Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090 (5th Cir. 1996); *Williams v. Channel Master Satellite Systems, Inc.*, 101 F.3d 346 (4th Cir. 1996); *Roush v. Weastec, Inc.*, 96 F.3d 840 (6th

(Cont'd)

was asked to determine whether the liability standard under the ADA is the "solely" standard — the same standard utilized in Rehabilitation-Act cases — or the "but-for" standard used in Title VII actions. On November 20, 1996, the Eleventh Circuit ruled that the correct liability standard is the "but-for" standard.

The Eleventh Circuit's opinion in the case at bar is flawed and in conflict with the following opinions of the Fourth, Fifth, Sixth, Seventh and Tenth Circuits, respectively:

- *Williams v. Channel Master Satellite Systems, Inc.*, 101 F.3d 346 (4th Cir. 1996);

- *Doe v. University of Maryland Medical Sys.*, 50 F.3d 1261 (4th Cir. 1995);

- *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995);

- *Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090 (5th Cir. 1996);

- *Rizzo v. Children's World Learning Ctrs.*, 84 F.3d 758 (5th Cir. 1996);

(Cont'd)
Cir. 1996); *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173 (6th Cir. 1996); *Rizzo v. Children's World Learning Ctrs.*, 84 F.3d 758 (5th Cir. 1996); *Despears v. Milwaukee County*, 63 F.3d 635 (7th Cir. 1995); *Doe v. University of Maryland Medical Sys.*, 50 F.3d 1261 (4th Cir. 1995); *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995); and *White v. York Int'l Corp.*, 45 F.3d 357 (10th Cir. 1995). The issue involved in these proceedings is whether the final, liability element of the *prima facie* case requires the plaintiff to prove: (a) that he or she was excluded from the employment or benefit in question "solely" on the basis of his or her disability; or (b) that he or she would not have been excluded from the employment or benefit in question "but for" his or her disability. The Eleventh Circuit is alone in believing that the latter is the more appropriate standard.

- *Roush v. Weastec, Inc.*, 96 F.3d 840 (6th Cir. 1996);

- *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173 (6th Cir. 1996);

- *Despears v. Milwaukee County*, 63 F.3d 635 (7th Cir. 1995); and

- *White v. York Int'l Corp.*, 45 F.3d 357 (10th Cir. 1995).[3]

The Fourth, Fifth, Sixth, Seventh and Tenth Circuits have correctly held, either expressly or implicitly, that the ADA liability standard is the "solely" standard. In these circuits, a plaintiff is required to demonstrate, in establishing his or her *prima facie* case of discrimination, that his or her disability was the *sole* reason for the adverse employment action. The Eleventh Circuit, by contrast, ruled that the correct standard is the "but-for" standard, which obligates a plaintiff to merely prove that the adverse employment action would not have occurred "but for" the plaintiff's disability. Significantly, in delineating its diverging position, the Eleventh Circuit acknowledged in its Opinion that it was "part[ing] company" with the holdings of other circuits. App. A, 18a-21a.

While Petitioners submit that the Eleventh's Circuit's view is incorrect, the resultant split among the circuits will undoubtedly create uncertainty as to what the appropriate liability standard is in cases brought under the ADA, and will necessarily impact thousands of pending disability-discrimination lawsuits throughout the United States, as well as

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3. The *Doe, Rizzo, Roush* and *Monette* decisions were rendered after the parties briefed their respective positions in the Eleventh Circuit. The *Williams* and *Turco* opinions were decided after the Eleventh Circuit's decision in the case at bar.

charges of discrimination filed with the Equal Employment Opportunity Commission and similar state agencies.

The Eleventh Circuit's ruling necessarily causes litigants to ponder: Is the liability standard the "solely" standard, as pronounced by the Fourth, Fifth, Sixth, Seventh and Tenth Circuits, or instead the "but for" standard advocated by the Eleventh Circuit? Must a plaintiff in an ADA disparate-treatment case prove, by a preponderance of the evidence, that he or she suffered adverse employment action "solely" because of his or her disability? Or, can a plaintiff merely demonstrate that he or she would not have suffered adverse employment action "but for" his or her disability? Unfortunately, the answers to these questions have become less clear as a result of the Eleventh Circuit's decision in this case.

This Court has the power to rectify the Eleventh Circuit's questionable ruling, and definitively resolve the new uncertainty created by the differing standards in the circuits on this important federal-law issue. Sup. Ct. R. 10; *Braxton v. United States*, 500 U.S. 344, 111 S. Ct. 1854, 114 L. Ed. 2d 385 (1991). Indeed, this Court should grant the petition for certiorari review to affirm the "solely" liability standard — not the standard adopted by the Eleventh Circuit — as the correct liability standard in cases arising under the ADA.

II.

THE "SOLELY" LIABILITY STANDARD IS THE CORRECT STANDARD IN CASES ARISING UNDER THE ADA.

A. The ADA's Legislative History Establishes That A Plaintiff Bringing A Claim For Disparate Treatment Under The ADA Must Prove, As Part Of Their *Prima Facie* Case, That The Adverse Employment Action Complained Of Was Based "Solely" Because Of Their Disability.

1. The ADA is modeled after the Rehabilitation Act, which employs the "solely" standard.

In 1973, the United States Congress passed the Rehabilitation Act in an effort, *inter alia*, to increase the employment of disabled persons by government employers and contractors and to curb discrimination of such persons. 29 U.S.C. § 701. Section 794(a) of the Rehabilitation Act proscribes the discrimination in employment of a "qualified individual with a disability . . . solely by reason of his or her disability." 29 U.S.C. § 794(a). Section 794(a) specifically provides, in pertinent part:

> No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, *solely by reason of his or her disability*, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. . . .

29 U.S.C. § 794(a) (emphasis added).

In construing § 794(a), courts, including the Eleventh Circuit, have consistently required plaintiffs to prove that discrimination on the basis of disability was the sole cause of the adverse employment action complained of. *See, e.g., Severino v. North Fort Myers Fire Control Dist.*, 935 F.2d 1179 (11th Cir. 1991); *Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1*, 909 F.2d 820, 825 (5th Cir. 1990); *Harris v. Adams*, 873 F.2d 929, 933 (6th Cir. 1989); *Norcross v. Snead*, 755 F.2d 113, 117 n. 5 (8th Cir. 1985); *Doe v. New York Univ.*, 666 F.2d 761, 774-75 (2d Cir. 1981); *Doe v. Attorney Gen. of United States*, 814 F. Supp. 844, 848 (N.D. Cal. 1992), *aff'd*, 34 F.3d 781 (9th Cir. 1994); *Assa 'Ad-Faltas v. Va.*, 738 F. Supp. 982, 987 (E.D. Va. 1989), *aff'd*, 902 F.2d 1564 (4th Cir. 1990).

Seventeen years after the passage of the Rehabilitation Act, the United States Congress enacted the ADA.[4] Pub. L. No. 101-336, 104 Stat. 327 (July 26, 1990) (codified at 42 U.S.C. §§ 12101, *et seq.*). Like the Rehabilitation Act, the ADA's purpose is to increase the employment of disabled persons, by private employers, and to curtail the discrimination against persons with disabilities. 42 U.S.C. § 12101. Moreover, as with the Rehabilitation Act, the ADA expressly prohibits employment discrimination of "qualified individual[s] with a disability" because of the disability. 42 U.S.C. § 12112(a). Section 12112 of the ADA states, in pertinent part, the following:

> No covered entity shall discriminate against a qualified individual with a disability *because of the disability of such individual* in regard to job application procedures, the

4. The ADA, enacted on July 26, 1990, became effective two years later on July 26, 1992. 42 U.S.C. § 12111 note.

> hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

42 U.S.C. § 12112(a) (emphasis added).

While the language contained in the discrimination provisions of the respective acts is not entirely identical, it is well-established that the similarities between the statutes are intentional, and that the ADA should be interpreted consistently with established Rehabilitation-Act legal principles. Consider the following:

• The ADA is modeled after the Rehabilitation Act. *See* H.R. Rep. 101-485, 101st Cong., 2nd Sess., at 32 (1990) (the ADA "borrows much of its substantive framework from Section 504 of the Rehabilitation Act of 1973").

• Many of the concepts and terminology which originated in the Rehabilitation Act are parroted in the ADA. These include the definitions of "disability," "qualified individual with a disability," "reasonable accommodation," and the general prohibitions against discrimination. *See* H.R. Rep. 101-485, Pt. 2, 101st Cong., 2nd Sess., at 52, 55-56, 62-63 (1990) (House Committee on Education and Labor Report); H.R. Rep. 101-485, Pt. 3, 101st Cong., 2nd Sess., at 27-40 (1990); *Sawinski v. Bill Currie Ford, Inc.*, 866 F. Supp. 1383 (M.D. Fla. 1994) (Congress intended the terms and regulations issued under the ADA should track those of the Rehabilitation Act).

• The ADA expressly provides that the imposition of inconsistent or conflicting standards be avoided by administrative agencies interpreting the ADA and the Rehabilitation Act:

> *The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C. § 701 et seq.] shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973. . . .*

42 U.S.C. § 12117(b) (emphasis added).

• The ADA further provides that the standards of the ADA shall *not* be interpreted to be lower than the standards applied under the Rehabilitation Act and its implementing regulations, unless the ADA expressly so provides. Section 12201(a) states:

> Except as otherwise provided in this chapter, *nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.*

42 U.S.C. § 12201(a) (emphasis added).

• Moreover, to ensure that the two statutes are read *in pari materia*, Congress amended the Rehabilitation Act in 1992 to apply the substantive standards of the ADA to § 794 complaints of employment discrimination. 29 U.S.C. § 794(d).

In short, the ADA's legislative history and express provisions unequivocally establish that the legal standards which govern the Rehabilitation Act likewise govern the ADA.

B. The Fourth, Fifth, Sixth, Seventh and Tenth Circuits Have Held That A Plaintiff Bringing A Claim For Disparate Treatment Under The ADA Must Prove, As Part Of Their *Prima Facie* Case, That The Adverse Employment Action Complained Of Was Based "Solely" Because Of Their Disability.

Given the intentional similarities between the ADA and the Rehabilitation Act, courts, in interpreting the ADA, regularly look to the Rehabilitation Act for guidance. Chief Judge Richard A. Posner of the Seventh Circuit Court of Appeals, in *Vande Zande v. State of Wisconsin Dep't of Admin.*, 44 F.3d 538 (7th Cir. 1995), observed this very point:

> . . . to a great extent the employment provisions of the new [ADA] Act merely generalize to the economy as a whole the duties, including that of reasonable accommodation, that the regulations under the Rehabilitation Act imposed on federal agencies and federal contractors. *We can therefore look to the decisions interpreting those regulations for clues to the meaning of the same terms in the new [ADA] law.*

44 F.3d at 541 (emphasis added).[5]

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5. *See also Bolton v. Scrivner, Inc.*, 36 F.3d 939 (10th Cir. 1994), *cert. denied*, __ U.S. __, 115 S. Ct. 1104, 130 L. Ed. 2d 1071 (1994); *Chandler v. City of Dallas*, 2 F.3d 1385 (5th Cir. 1993), *cert. denied*, __ U.S. __, 114 S. Ct. 1386, 128 L. Ed. 2d 61 (1994) ("[t]he ADA defines a disability in substantially the same terms as the [Rehabilitation] Act defines an individual

(Cont'd)

This same comparison analysis has been performed by the Fourth, Fifth, Sixth, Seventh and Tenth Circuits with respect to the prevailing liability standard under the ADA. For instance, in *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995), the plaintiff commenced an action against his employer, *inter alia*, for disability discrimination under the ADA. On summary judgment, Myers' employer argued, among other things, that Myers was not a "qualified individual with a disability" because he could not perform the essential functions of his job. The District Court granted, on all counts, the employer's motion for summary judgment. In affirming the District Court's grant of summary judgment in favor of the employer, the Fourth Circuit Court of Appeals held that the liability standard under both the ADA and the Rehabilitation Act were the same. The court noted, in relevant part:

> Myers' major claim is one of handicap discrimination. Section 504 of the Rehabilitation Act of 1973, as amended, provides in pertinent part that "[n]o otherwise qualified individual with a disability . . . shall, solely by reason of her or his disability, . . . be subjected to discrimination under any program or activity receiving Federal financial assistance." 29 U.S.C. § 794(a). *In 1990, Congress extended § 504's prohibitions to private employers in the Americans with Disabilities Act. . . . That legislation codified much of the case law and the implementing regulations developed under the*

(Cont'd)
with handicaps (now an individual with a disability)"); *Lyons v. Legal Aid Society of New York*, 68 F.3d 1512 (2d Cir. 1995) ("the ADA incorporates many of the standards of discrimination set out in regulations implementing section 504 of the Rehabilitation Act").

> *Rehabilitation Act. The overlap between the two statutes is substantial: indeed, the ADA specifies that administrative complaints filed under either statute be 'dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements.'* 42 U.S.C. § 12117(b); *see Tyndall v. National Educ. Centers*, 31 F.3d 209, 213 n. 1 (4th Cir. 1994) (relying in an ADA case on Rehabilitation Act case law). *In 1992, in order to clarify the standards governing federally-funded entities, Congress amended § 504 to expressly incorporate the liability standards of the ADA. . . .*

50 F.3d at 281 (emphasis added).

In conclusion, the court ruled:

> *. . . Thus, whether suit is filed against a federally-funded entity under the Rehabilitation Act or against a private employer under the ADA, the substantive standards for determining liability are the same.*

50 F.3d at 281 (emphasis added).

Meanwhile, the Tenth Circuit Court of Appeals implicitly held in *White v. York Int'l Corp.*, 45 F.3d 357 (10th Cir. 1995), that the ADA requires, for purposes of liability, that the disability be the *sole* reason for the adverse employment action. In *White*, the plaintiff, White, brought an action under the ADA after being

terminated from his position as a machine operator. The employer, York, claimed in defense that White's termination was due to his inability to perform the job. York thereafter moved for summary judgment. The District Court granted the employer's motion for summary judgment, and White appealed. The Tenth Circuit Court of Appeals, in affirming the lower court's grant of summary judgment, outlined the respective burdens of proof which parties to an ADA suit must satisfy. Moreover, the court noted that, while it did not have to consider directly the liability issue in light of the appropriateness of summary judgment under the circumstances of the case, York would have had to have proven, as part of his case, that he was "terminated *solely* because of his disability." The court explained:

> . . . White has produced no evidence that accommodation was possible. Thus, he has failed to establish an essential element of his case: that he is a "qualified person with a disability," entitled to the protections of the ADA. On that basis, the district court properly granted summary judgment in favor of York. . . . ***Because White has failed to establish the second element of his claim, that he was 'qualified' under the ADA, it follows that we need not address the remaining element of his claim, whether York terminated him solely because of his disability.***

45 F.3d at 363 (emphasis added).

Similarly, in another Chief Judge Posner opinion, the Seventh Circuit Court of Appeals ruled that the appropriate liability standard in ADA cases is the "solely" standard. In *Despears v. Milwaukee County*, 63 F.3d 635 (7th Cir. 1995), the

court held that the plaintiff, an alcoholic who brought disability discrimination claims under both the ADA and Rehabilitation Act as a result of a demotion, needed to demonstrate that his alcoholism, *i.e.*, disability, was the *sole* cause of his demotion. In a lengthy exposition, Judge Posner wrote:

> Mr. Despears worked as a maintenance worker for a public medical facility. His work involved occasional driving, to deliver parts; and a regulation of the employer required workers in his job classification to have a valid driver's license. Despears' license was revoked after he was convicted a fourth time of driving under the influence of alcohol. Upon learning of the revocation, his employer demoted Despears to custodial worker, a job classification that does not involve any driving and does not require that the worker have a driver's license — and that pays less. Despears attributes the loss of his license to his having been an alcoholic, and the defendants do not deny that alcoholism is a disability within the meaning of both statutes. . . . In urging the district he argues as follows: alcoholism caused him to drive under the influence of alcohol; driving under the influence of alcohol caused him to lose his driver's license; losing his driver's license caused him to be demoted; therefore alcoholism was the cause of his being demoted; therefore he was discriminated against by his employer on account of his disability, in violation of the statutes. . . .

Although something like a third of all drivers who are convicted for driving under the influence of alcohol are not alcoholics in the sense of persistent alcohol abusers . . . , and although many alcoholics refrain from driving while under the influence of alcohol, there is no doubt (though we cannot find any statistics on the question) that an alcoholic is more likely than a nonalcoholic to lose his license because of drunk driving. The high fraction of alcoholics among persons convicted of drunk driving implies this, as does the fact that the set of nonalcoholics includes many people who do not drink at all and therefore never lose their license because of drunk driving. So alcoholics are more likely, probably much more likely, to lose their driver's license because of drunk driving than people who are not alcoholics, and this is enough to show that there is a causal relation between Despears' alcoholism and his demotion. We may assume, because he claims not implausibly and there is no contrary evidence at this stage, that he would not have been convicted four times of drunk driving had he not been an alcoholic and that his alcoholism also made it antecedently more probable that he would be convicted. A necessary condition that makes the event of which it is a condition more likely to occur is a "cause" for most purposes in law, . . . , including we may assume the ADA and the Rehabilitation Act. If someone asked Despears why he was demoted and he replied that it was because he was an alcoholic, we

> would not have a sense that he was using the word "cause" in an incorrect or even nonstandard way.
>
> But a cause is not a compulsion *(or sole cause); and we think the latter is necessary to form the bridge that Despears seeks to construct between his alcoholism and his demotion. . . .*

63 F.3d at 635-36 (citations omitted) (emphasis added). *See also Turco v. Hoechst Celanese Corp.*, 101 F.3d 1090 (5th Cir. 1996) (to prevail on an ADA claim, a plaintiff must prove that he or she has a disability; he or she is "qualified" for the job; and an adverse employment decision was made *solely* because of his or her disability); *Williams v. Channel Master Satellite Systems, Inc.*, 101 F.3d 346 (4th Cir. 1996) (plaintiff in ADA case must establish, among other things, "that [s]he was excluded from the employment or benefit due to discrimination *solely* on the basis of the disability" (emphasis added)); *Roush v. Weastec, Inc.*, 96 F.3d 840 (6th Cir. 1996) (ADA plaintiff must prove, *inter alia*, that an adverse employment decision was made *solely* because of his or her disability); *Monette v. Electronic Data Systems Corp.*, 90 F.3d 1173 (6th Cir. 1996) ("[t]he analysis of claims under the Americans With Disabilities Act roughly parallels those brought under the Rehabilitation Act"; to recover under ADA, plaintiff must show, among other things, he or she was discharged *solely* by reason of his or her handicap); *Rizzo v. Children's World Learning Ctrs.*, 84 F.3d 758 (5th Cir. 1996) (in addition to proving that he or she is a qualified individual with a disability, a plaintiff must prove that he or she suffered an adverse employment action *solely* because of his or her disability); *Doe v. University of Maryland Medical Sys.*, 50 F.3d 1261 (4th Cir. 1995) (plaintiff must prove, *inter alia*, that he or

she was discriminated against *solely* because of his or her disability).[6]

In short, the "solely" liability standard is the correct standard in cases arising under the ADA. The legislative history, coupled with the view of the overwhelming majority of circuits, establishes that a plaintiff bringing a claim for disparate treatment under the ADA must prove, as part of their *prima facie* case, that the adverse employment action complained of was based "solely" because of their disability.

C. The Eleventh Circuit's Holding In The Instant Action That The "But-For" Standard Applies In ADA Cases Is Incorrect.

As noted, the Eleventh Circuit pronounced in its Opinion that the appropriate liability standard in ADA cases is the "but-for" Title VII standard. To bolster its Opinion, the Eleventh Circuit made the point of noting that the anti-discrimination provision of the ADA: (i) more closely tracks the language of Title VII; and (ii) fails to contain the word "solely" within it.

Notwithstanding the Eleventh Circuit's ruling, the "but-for" standard is not the standard Congress chose. Congress clearly chose to model the ADA's *substantive* legal requirements upon the Rehabilitation Act and its jurisdictional, procedural and remedial requirements on Title VII. The House of

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6. It should be noted that the Third Circuit, in *Newman v. GHS Osteopathic, Inc., Parkview Hospital Div.*, 60 F.3d 153 (3d Cir. 1995), intimated that ADA plaintiffs in pretext cases "need only prove that the illicit factor 'played a role in the decisionmaking process and that it had a determinative effect on the outcome of that process.' " *Newman*, 60 F.3d at 157 (*citing Miller v. CIGNA Corp.*, 47 F.3d 586, 598 (3d Cir. 1995) (en banc)). To the extent the Third Circuit's holding is intended to suggest that a "but-for" liability standard is the appropriate standard in ADA cases, its ruling is further evidence of a conflict among the circuits.

Representatives Committee Report expressly observes this point:

> Title I [of the ADA] prohibits discrimination in employment against a qualified person with a disability. The title borrows much of its procedural framework from title VII of the Civil Rights Act of 1964, which prohibits discrimination in employment on the basis of race, color, religion, sex or national origin, by incorporating Title VII's enforcement provisions, notice posting provisions, and employer coverage provisions. *The title borrows much of its substantive framework from Section 504 of the Rehabilitation Act of 1973.*

H.R. Rep. 101-485, Pt. 3, 101st Cong., 2nd Sess., at 32 (1990) (emphasis added). While Congress elected to incorporate by reference certain of Title VII's procedural, enforcement and remedial mechanisms, *it did not incorporate Title VII's substantive prohibitions against discrimination, i.e.*, elements of causation and liability. *See* 42 U.S.C. § 12117(a).

What is more, it appears that Congress deliberately omitted the word "solely" from the statutory language to avoid absurd results by the literal application of the language in certain contexts, particularly when an ADA plaintiff has a concomitant claim for discrimination based on another protected-class status. The House Committee Report explained Congress' decision to leave the word "solely" out of Title II of the ADA (the public sector title) in the following way:[7]

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7. There is no legislative history as to why the word "solely" was not included in Title I of the ADA, the private sector title applicable to this case.

The committee recognizes that the phrasing of section 202 in this legislation differs from section 504 [of the Rehabilitation Act] by virtue of the fact that the phrase "solely by reason of his or her handicap" has been deleted. The deletion of this phrase is supported by the experience of the executive agencies charged with implementing section 504 [of the Rehabilitation Act]. The regulations issued by most executive agencies use the exact language set out in section 202 in lieu of the language included in the section 504 statute.

A literal reliance on the phrase "solely by reason of his or her handicap" leads to absurd results. For example, assume that an employee is black and has a disability and that he needs a reasonable accommodation that, if provided, will enable him to perform the job for which he is applying. He is a qualified applicant. Nevertheless, the employer rejects the applicant because he is black and because he has a disability.

In this case, the employer did not refuse to hire the individual solely on the basis of his disability — the employer refused to hire him because of his disability and because he was black. Although the applicant might have a claim of race discrimination under Title VII of the Civil Rights Act, it could be argued that he would not have a claim under section 504 [of the Rehabilitation Act] because the failure to hire was not based solely on his

> disability and as a result he would not be entitled to a reasonable accommodation.
>
> The Committee, by adopting the language used in regulations issued by the executive agencies, rejects the result described above.

H.R. Rep. 101-485, Pt. 2, 101st Cong., 2nd Sess., at 85 (1990). In essence, Congress' rejection of the word "solely" was intended to ensure that multiple-claim plaintiffs are not denied the opportunity to assert all of their claims. Congress did not intend, as the Eleventh Circuit suggests, to dilute the quality of the evidence which a disability-discrimination plaintiff is otherwise required to proffer to prove his or her disability-discrimination claim.

In summary, the ADA liability standard adopted by the Fourth, Fifth, Sixth, Seventh and Tenth Circuits is logical, particularly when considered in conjunction with relevant issues of statutory construction. Stated succinctly, the ADA is more akin to the Rehabilitation Act than it is to Title VII. Indeed, the ADA differs from Title VII and has distinct requirements. While both statutes do proscribe certain kinds of discrimination in the workplace, unlike Title VII which seeks to create a society blind to certain protected-class characteristics, the ADA does not seek to create a disability-blind society. For instance, in ADA cases:

- Employers are often required to consider the impact of a person's disability in making employment decisions because the statute recognizes that a disability may impact the ability to perform a particular job. Thus, the ADA protects only persons with disabilities who are "qualified" to perform a job's essential functions. 42 U.S.C. §§ 12111(8), 12112(a).

• Employers expressly are permitted to consider the impact of a person's disability during a medical examination undertaken after a conditional offer of employment is made or after an individual becomes an employee if job-related and consistent with business necessity. 42 U.S.C. § 12112(d).

• Employers are also allowed to refuse to provide a reasonable accommodation if such accommodation would impose an "undue hardship" on the employer. 42 U.S.C. § 12112(b)(5)(A).

• Moreover, employers are permitted to exclude an individual who would pose a "direct threat" to the health and safety of other individuals in the workplace. 42 U.S.C. § 12113(b).

Under the ADA, therefore, employers must not ignore disability, but rather expressly and appropriately confront it and assess its impact on the workplace. On the other hand, under Title VII, employers are required to ignore, or not consider, the protected-class status in making employment decisions. Thus, as a legal matter, the legal standard in evaluating employer conduct and liability cannot be the same under both statutes.[8] Indeed, it would be counterproductive of the goals of the ADA to interpret the statute to establish strict liability where disability is a motivating factor for an employment decision when Congress requires an employer to consider disability when making employment decisions. If Congress had intended for

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8. It should be noted further that the ADA makes unlawful some employer actions that would not violate Title VII. For example, the ADA restricts inquiries and medical examinations regarding the disability status of applicants and employees. 42 U.S.C. § 12112(d).

the ADA to operate like Title VII, Congress could have simply amended Title VII to include disability as a protected class by merely adding the word "disability" to § 2000e-2(a)(1) of Title VII. Congress, however, chose not to do so. Instead, Congress created a new, complex, detailed statutory scheme modeled after the Rehabilitation Act, incorporating the Rehabilitation Act's substantive requirements.

CONCLUSION

The Eleventh Circuit Court of Appeals' decision in this cause has created a conflict among the circuits as to the nature of the liability element of a plaintiff's *prima facie* case in an action for disability discrimination under the ADA. This Court should resolve the split among the circuits, and decide an important question of federal law that has not been, but should be, settled by this Court. For the foregoing reasons, the Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT DATED NOVEMBER 20, 1996

Bernard F. McNELY, Plaintiff-Appellant,

v.

OCALA STAR-BANNER CORPORATION, a Florida corporation; The New York Times Company, a foreign corporation, Defendants-Appellees.

No. 95-3179.

United States Court of Appeals,
Eleventh Circuit.

Nov. 20, 1996.

* * *

Appeal from the United States District Court for the Northern District of Florida.

Before BIRCH and CARNES, Circuit Judges, and MICHAEL*, Senior District Judge.

CARNES, Circuit Judge:

In this Americans with Disabilities Act ("ADA") case, Bernard McNely appeals from a judgment entered pursuant to a jury verdict in favor of the defendants, Ocala Star-Banner Corporation and the New York Times Company. This appeal

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* Honorable James H. Michael, Senior U.S. District Judge for the Western District of Virginia, sitting by designation.

presents the question of whether a plaintiff suing under the ADA can recover for discrimination without showing that his disability was the *sole* cause for the adverse employment action taken against him. We hold that he can, and that the district court erred by submitting to the jury a special interrogatory verdict form that allowed recovery for McNely's ADA discrimination claim only if the jury found that he was terminated "solely because of his alleged disability." Similarly, we hold that it was error for the district court to require the jury to find that McNely was terminated "solely because he engaged in a statutorily protected expression" in order for him to recover on his ADA retaliation claim. Finally, in view of the pleadings and evidence in this case, we hold that the district court erred by requiring the jury to find that McNely was "terminated" in violation of the ADA in order for McNely to recover on either his discrimination claim or his retaliation claim.

I. BACKGROUND FACTS

The Ocala Star-Banner Corporation ("Star-Banner"), a subsidiary of the New York Times Company, publishes a daily newspaper entitled the "Ocala Star-Banner." McNely began his employment with Star-Banner in June 1980. Initially, McNely worked as a "pressman." Nine years later, in August 1989, McNely was promoted to Night Supervisor of the Camera Department.

In April 1992, McNely underwent brain surgery as a result of an arteriovenous malformation of the brain. That surgery was generally successful, except that McNely subsequently began experiencing vision problems. It was later determined that the surgery had caused McNely to develop a form of "left homonymous hemianopsia." In simpler terms, the surgery

damaged part of McNely's brain, and as a result, he cannot clearly see the left half of visual images.

McNely's vision problems made it difficult, if not impossible, to perform "close color registration," a process involving the overlaying and lining up of color negatives to produce a color image, which is then printed onto newsprint as a color picture. Close color registration is but one of the duties of a supervisor in the camera department and, for a time, Star-Banner arranged for someone to assist McNely with his performance of that task. That assistance came to an end, however, when Star-Banner came to believe that McNely's eye trouble could be corrected with new eyeglasses. At some point thereafter, McNely filed a grievance about his working conditions with the Equal Employment Opportunity Commission ("EEOC").

For a time, McNely managed his duties without the assistance that Star-Banner had withdrawn. In August 1993, however, McNely's vision difficulties — or his perception of them — led to a 40-minute shutdown of the Star-Banner printing presses. McNely insisted that the shutdown was caused by his inability to perform close color registration without assistance, but Star-Banner management contended it was caused by McNely's willful refusal to perform his job. Subsequently, McNely was relieved of his supervisory duties and was reassigned to the building maintenance department. When McNely objected to that, he was reassigned to do clerical work. Later, Star-Banner reassigned McNely to the shipping and loading department, which required him to perform tasks that he contends were "difficult or impossible for a man of Plaintiff's medical and physical condition to perform."

Appendix A

On January 18, 1994, McNely met with Charles Stout, the highest-ranking executive at Star-Banner, to discuss McNely's overall work situation, including his work assignments. That meeting did not go well. McNely ended up losing his temper and calling Stout an "arrogant son-of-a-bitch." Understandably, that conduct ended the meeting, and McNely was immediately suspended without pay. Star-Banner determined that McNely's suspension would last for approximately six months, and that his employment would be terminated on July 28, 1994.[1] By letter, Stout informed McNely that his suspension and termination had "resulted from your repeated belligerent, abusive and insubordinate conduct towards me and others at the Ocala Star-Banner."

During his suspension, McNely received a "right to sue" notice from the EEOC. Thereafter McNely filed this lawsuit alleging violations of the ADA. In Counts I and III, McNely alleged that Star-Banner and the New York Times had wrongfully discriminated against him because of his disability. In Counts II and IV, McNely alleged that the defendants had retaliated against him for engaging in protected expression, specifically for filing his EEOC grievance.

Following five days of trial, McNely's claims were submitted to the jury with a special interrogatory verdict form. After more than seven hours of deliberation, the jury found: (1) that McNely is an "individual with a disability" within the

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1. The defendants contended that they suspended McNely for six months, instead of terminating him immediately, "[i]n an act of extraordinary compassion . . . so that he would remain eligible for medical benefits," but McNely characterized the suspension as "yet another attempt by the employer to force Mr. McNely to sever his employment with the Ocala Star-Banner voluntarily."

meaning of the ADA; (2) that McNely had proven he was able to perform the essential functions of the position of Camera Room Night Supervisor; (3) that the defendants had failed to prove that they had reasonably accommodated McNely; and (4) that allowing McNely to work as a Camera Room Night Supervisor would not have imposed an undue hardship on the defendants.[2] Despite those findings, the jury's ultimate verdict was for the defendants, because the jury answered "No" to questions five and six on the verdict form, as follows:

> 5. Do you find, by a preponderance of the evidence, that Plaintiff has proved that he was terminated solely because of his alleged disability?
>
> Yes___ No_X_
>
> 6. Do you find, by a preponderance of the evidence, that Plaintiff has proved that he was terminated solely because he engaged in a statutorily protected expression?
>
> Yes___ No_X_

After the district court denied his motion for a new trial, McNely filed this appeal. McNely's primary contentions on appeal are that the special interrogatory verdict form was fatally flawed in two ways. First, McNely contends that inclusion of the term "solely" in questions five and six erroneously prevented the jury from returning a verdict for the plaintiff if the jury found that impermissible discrimination or retaliation had a

2. The defendants did not cross-appeal to challenge any of these four findings, and we express no opinion about them.

determinative effect on the defendants' decisionmaking process, but was not the sole reason for the employment decision. Second, McNely contends that questions five and six erroneously narrowed the jury's inquiry to whether McNely was "terminated" because of discrimination or retaliation, even though the ADA authorizes recovery for adverse employment actions that fall short of termination and even though McNely had put on evidence of such actions in this case.[3]

II. STANDARDS OF REVIEW

We apply the same deferential standard of review to a special interrogatory verdict form that we apply to a district court's jury

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3. McNely makes two additional contentions in his quest for a new trial, but neither of those need detain us long. First, McNely contends that the verdict form and related jury instructions were flawed because they failed to address a provocation "defense" to McNely's alleged work place misconduct, including his outburst during his meeting with Stout. However, McNely does not cite, and we have not found, any authority that a provocation defense to employee misconduct is recognized under the ADA, or that provocation is in any way relevant to an ADA claim. Therefore, we reject McNely's contention that the verdict form and jury instructions should have addressed his provocation defense.

McNely also contends that the district court permitted defense counsel to engage in an impermissible "golden rule" argument at trial. McNely charges that defense counsel engaged in a prohibited golden rule argument by inviting the jury to put itself in the defendants' position when considering McNely's alleged work place misconduct and evaluating whether he was terminated because of his disability. However, an impermissible golden rule argument is an argument "in which the jury is exhorted to place itself in a party's shoes *with respect to damages.*" *Burrage v. Harrell*, 537 F.2d 837, 839 (5th Cir.1976) (emphasis added). As in *Burrage*, "[i]n this case the argument complained of was not in any way directed to the question of damages; rather it related only to the reasonableness of appellee's actions." *Id.* (citations omitted). Accordingly, the argument was not impermissible.

instructions. *Cf. Bank South Leasing, Inc. v. Williams,* 778 F.2d 704, 706 (11th Cir.1985) (holding that district court erred by failing to give jury instructions consistent with special interrogatory verdict). So long as the jury instructions and verdict form "accurately reflect the law, the trial judge is given wide discretion as to the style and wording employed." *U.S. v. Starke,* 62 F.3d 1374, 1380 (11th Cir.1995) (citing *McElroy v. Firestone Tire & Rubber Co.,* 894 F.2d 1504, 1509 (11th Cir.1990)). On appeal, we examine whether the jury instructions and verdict form, considered as a whole, were sufficient "so that the jurors understood the issues and were not misled." *Id.* (quoting *Wilkinson v. Carnival Cruise Lines, Inc.,* 920 F.2d 1560, 1569 (11th Cir.1991)). As for the subsidiary issue of whether the jury instructions and verdict form "accurately reflect the law," *Starke,* 62 F.3d at 1380, we renew that *de novo* as with any other question of law. *E.g., Swint v. City of Wadley,* Ala., 51 F.3d 988, 994 (11th Cir.1995).

III. WHETHER McNELY WAIVED HIS OBJECTIONS TO THE VERDICT FORM

The defendants contend that McNely waived his objections to the verdict form because he failed to state his objections to the verdict form after it was read to the jury. We disagree. McNely's counsel raised his objections to the verdict form specifically and directly on two separate occasions. Before the case was submitted to the jury, the court held a jury charge conference. At that conference, McNely's counsel objected to the verdict form on the same bases that he raises on appeal: (1) the inclusion of the term "solely" in questions five and six, and (2) the limiting use of the word "termination" in the same questions. McNely's counsel made extensive arguments in support of his request that the verdict form be modified

accordingly. The district court stated that it was "not inclined to change" the form, but would consider the matter overnight. The charge conference was then continued to the next day.

When the charge conference was reconvened the next day, the following exchange occurred between the court and McNely's counsel:

> THE COURT: When we parted yesterday, I told you I didn't think I was going to change this verdict, and I'm not, except for the agreed language change we made on — I forget where it was. Other than that, it is as it was yesterday.
>
> MR. O'NEILL: Your Honor, if I may just for the record, I would like to perfect our objections to certain aspects of the verdict form that we raised yesterday; and, in particular, Your Honor, I think probably the major objection we have is the insertion of the words "solely because of the alleged disability" as that appears in Instruction 5 and Instruction 6 on the verdict form, Your Honor.

Thereafter, McNely's counsel provided the court with argument and citations of authority in support of his objections, including his objection to the limiting use of the word "termination" in questions five and six. Once again, the district court denied counsel's request to modify the verdict form.

After closing arguments, the district court delivered its instructions to the jury, including instructions about completion

of the verdict form. The district court then gave counsel the opportunity to raise any new objections, but specifically stated: "[A]ll prior motions, all prior objections, both to the instructions or any matters that have taken place in the trial, all motions will be considered raised again at this time. All previous rulings will continue to apply." In view of that assurance, McNely's counsel did not raise and reargue the same objections that he had already raised and argued twice, and that the district court had twice overruled. In these circumstances, we hold that McNely's counsel preserved his objections to the verdict form, and we proceed now to the merits of those objections. *See Landsman Packing Co. v. Continental Can Co.*, 864 F.2d 721, 726 (11th Cir.1989).

IV. WHETHER USE OF THE TERM "SOLELY" IN THE VERDICT FORM CORRECTLY STATED THE LIABILITY STANDARD UNDER THE AMERICANS WITH DISABILITIES ACT

The stated purpose of the ADA is "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C.A. § 12101(b)(1) (West 1995). Title I of the ADA, which applies to the private sector, provides for the elimination of disability-based discrimination as follows:

> No covered entity shall discriminate against a qualified individual with a disabil*ity because of* the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

Id. § 12112(a) (emphasis added). Title II of the ADA, which applies to public sector employment, contains a parallel provision. It provides:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, *by reason of* such disability, be excluded from participation in or be denied the benefits of the services, programs, or activities of a public entity, or be subjected to discrimination by any such entity.

Id. § 12132 (emphasis added).

The ADA also seeks to eliminate retaliation by employers against employees who seek to enforce their statutory rights. Specifically, Title IV of the ADA provides as follows:

> No person shall discriminate against any individual *because* such individual has opposed any act or practice made unlawful by this chapter or because such individual made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this chapter.

Id. § 12203(a) (emphasis added).

The defendants contend that the foregoing provisions impose liability only if the employer takes an adverse employment action *solely* because of a reason prohibited by the statute, and for that reason the verdict form provided the jurors

with an accurate statement of the law. Conversely, McNely contends that those provisions impose liability if a prohibited reason was but one factor in the employer's decision, so long as the inclusion of that prohibited factor made the difference in the decision. Stated differently, McNely contends that the ADA requires only "but-for" causation before liability can be imposed. In McNely's view, the verdict form misstated the liability standard applicable to this case. We agree.

A. The Statutory Language

As with any other statute, the appropriate starting point for our analysis is the plain language of the statute itself. "We must give effect to this plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning." *Shaw v. Delta Air Lines*, 463 U.S. 85, 97, 103 S.Ct. 2890, 2900, 77 L.Ed.2d 490 (1983) (citations omitted). As an initial matter, we note that the foregoing liability provisions do not contain the word "solely," or any other similar restrictive term. Therefore, unless we can discern a very good reason to read the restrictive term "solely" into two statutory provisions where it is not found, this is a simple case.

The defendants argue that a good reason for judicially writing "solely" into the statute may be found in the ADA itself, when read in conjunction with the Rehabilitation Act. Specifically, the defendants point to the following language in the ADA:

> Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the

> Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

42 U.S.C.A. § 12201(a) (West 1995). The defendants then point out that the liability provision of the Rehabilitation Act contains the word "solely," as follows:

> No otherwise qualified handicapped individual in the United States, as defined in section 706(7) of this title, shall, *solely by reason of* his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C.A. § 794 (West 1985) (emphasis added). Thus, argue the defendants, the ADA can provide no greater relief to victims of discrimination than the Rehabilitation Act, which sets up a sole-cause liability scheme, *see, e.g., Severino v. North Fort Myers Fire Control Dist.*, 935 F.2d 1179, 1182-83 (11th Cir.1991) (affirming judgment in favor of employer on Rehabilitation Act claim because employee could not demonstrate that he was discriminated against solely on the basis of his handicap).

Assuming that "lesser standard" in section 12201(a) means a more plaintiff-friendly standard, the defendants' argument has some superficial appeal. However, it loses its appeal upon closer inspection, because the same ADA provision the defendants rely

upon to import the sole-cause liability standard of the Rehabilitation Act contains the limiting language "[e]xcept as otherwise provided in this chapter," 42 U.S.C.A. § 12201(a) (West 1995). Because Congress has used language in the ADA that is broader than the language included in the comparable provision of the Rehabilitation Act, we are not persuaded that section 12201(a) nonetheless directs us to import into the ADA the more restrictive Rehabilitation Act language. Instead, we are convinced that section 12201(a), by its own terms, directs us not to do so.

Moreover, we believe that importing the restrictive term "solely" from the Rehabilitation Act into the ADA cannot be reconciled with the stated purpose of the ADA — "the elimination of discrimination against individuals with disabilities," 42 U.S.C.A. § 12101(b)(1) (West 1995). That is true, because a standard that imposes liability only when an employee's disability is the sole basis for the decision necessarily tolerates discrimination against individuals with disabilities so long as the employer's decision was based — if ever so slightly — on at least one other factor. A liability standard that tolerates decisions that would not have been made in the absence of discrimination, but were nonetheless influenced by at least one other factor, does little to "eliminate" discrimination; instead, it indulges it. The plain language of the Rehabilitation Act appears to mandate such indulgence, but the plain language of the ADA does not.

Because we believe that importing the term "solely" into the ADA is not warranted under the statute's plain language, is not authorized by section 12201(a), and is not consistent with the explicitly stated purpose of the statute, our analysis could stop at this point. Nevertheless, for the sake of completeness,

we add that even if section 12201(a) were viewed to create an ambiguity, for the following reasons, the ADA's legislative history would support the same result we reach under our plain language analysis.

B. Legislative History

The ADA's legislative history does not directly inform us why Congress chose to leave the word "solely" out of the liability provision of Title I (the private sector title applicable to this case), nor why Congress left that term out of the anti-retaliation provision of Title IV. However, the legislative history does clearly explain why Congress chose to leave the word "solely" out of Title II (the public sector title). Because the relevant causal language in the liability provisions of all three titles is substantially identical, *compare* 42 U.S.C. § 12112(a) ("because of the disability") *with id.* § 12132 ("by reason of such disability") *and id.* § 12203 ("because such individual has made a charge"), Congress' rationale for leaving "solely" out of the Title II liability provision sheds some light on its rationale for leaving the same word out of the parallel Title I and Title IV provisions. The House Committee Report explained the decision to leave "solely" out of Title II, as follows:

> The Committee recognizes that the phrasing of section 202 in this legislation differs from section 504 [of the Rehabilitation Act] by virtue of the fact that the phrase "solely by reason of his or her handicap" has been deleted. The deletion of this phrase is supported by the experience of the executive agencies charged with implementing section 504 [of the

Rehabilitation Act]. The regulations issued by most executive agencies use the exact language set out in section 202 in lieu of the language included in the section 504 statute.

A literal reliance on the phrase "solely by reason of his or her handicap" leads to absurd results. For example, assume that an employee is black and has a disability and that he needs a reasonable accommodation that, if provided, will enable him to perform the job for which he is applying. He is a qualified applicant. Nevertheless, the employer rejects the applicant because he is black and because he has a disability.

In this case, the employer did not refuse to hire the individual solely on the basis of his disability — the employer refused to hire him because of his disability and because he was black. Although the applicant might have a claim of race discrimination under title VII of the Civil Rights Act, it could be argued that he would not have a claim under section 504 [of the Rehabilitation Act] because the failure to hire was not based solely on his disability and as a result he would not be entitled to a reasonable accommodation.

The Committee, by adopting the language used in regulations issued by the executive agencies, rejects the result described above.

H.R.Rep. No. 485(II), 101st Cong., 2nd Sess., at 85 (1990). The Senate Committee Report contains a virtually identical passage. *See* S.Rep. No. 116, 101st Cong., 1st Sess., at 44-45 (1989).

The explanation the congressional committees gave shows that Congress knew exactly what it was doing when, by omitting the word "solely," it provided a different liability standard under Title II of the ADA than it provided under the Rehabilitation Act. Congress deliberately used different language in the ADA, because it believed inclusion of the word "solely" in Title II could lead to absurd results. We have no reason to believe that Congress intended to condemn absurd results in Title II of the ADA, but using substantially identical language in Titles I and IV of the same statute wanted to invite those same absurd results. As we explain below, turning to other evidence of congressional intent, our conclusion is bolstered by the fact that when Congress enacted the ADA, the Supreme Court already had rejected the notion that "because of" in Title VII cases could be construed to mean "solely because of."

C. The Supreme Court's Interpretation of "Because of" in Title VII Cases

Title VII makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, *because of* such individual's race, color, religion, sex, or national origin." 42 U.S.C.A. § 2000e-2(a)(1) (West 1994) (emphasis added). The relevant causal language of Title VII's liability provision is substantially identical to the causal language at issue in this case. *Compare id.* (Title VII) ("because of") *with* 42 U.S.C.A. § 12101(b)(1) (ADA Title I) ("because of") *and* 42

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U.S.C.A. § 12203 (ADA Title IV anti-retaliation provision) ("because").

When Congress enacted the ADA in 1990, the Supreme Court had already authoritatively determined that, for Title VII cases, "because of" does *not* mean "solely because of." In *Price Waterhouse v. Hopkins*, 490 U.S. 228, 109 S.Ct. 1775, 104 L.Ed.2d 268 (1989), the Supreme Court focused on the nature of the causal connection required by the phrase "because of" in Title VII cases. No opinion of the Court garnered a majority of the votes in *Price Waterhouse*, in part because the justices held differing views about whether the "because of" requirement meant that the impermissible consideration was a "but-for" cause, or meant only that it had been taken into account in the decisionmaking process. *Compare id.* at 244, 109 S.Ct. at 1787 (plurality opinion) *with id.* at 262-63, 109 S.Ct. at 1797 (O'Connor, J., concurring in the judgment). However, all of the justices agreed that "because of," as used in Title VII, does *not* mean "solely because of." *See id.* at 241, 109 S.Ct. at 1785 (plurality opinion); *id.* at 258-59, 109 S.Ct. at 1795 (White, J., concurring in the judgment); *id.* at 262-63, 109 S.Ct. at 1797 (O'Connor, J., concurring in the judgment); *id.* at 284, 109 S.Ct. at 1808 (Kennedy, J. dissenting); *see also Miller v. CIGNA Corp.*, 47 F.3d 586, 592-94 (3rd Cir.1995) (analyzing and summarizing the "because of" analysis contained in the various *Price Waterhouse* opinions).

A familiar canon of statutory construction is that "evaluation of congressional action must take into account its contemporary legal context." *Morse v. Republican Party of Virginia*, __ U.S. __, 116 S.Ct. 1186, 1190, 134 L.Ed.2d 347 (1996) (plurality opinion) (citing *Cannon v. University of Chicago*, 441 U.S. 677, 698-99, 99 S.Ct. 1946, 1958 69, 60 L.Ed.2d 660 (1979)); *see*

also Motorcity of Jacksonville, Ltd. v. Southeast Bank N.A., 83 F.3d 1317, 1331 (11th Cir. 1996) (en banc) (recognizing principle that "Congress legislates against the background of the existing common law"). That presumption is particularly compelling where, as here, Congress adopts operative language to which the Supreme Court has recently given an authoritative interpretation in a similar context. When Congress enacted the ADA, it did so against the backdrop of recent Supreme Court employment discrimination case law that interpreted the phrase "because of" *not* to mean "solely because of." We think Congress knew what it was doing, and we hold that the ADA imposes liability whenever the prohibited motivation makes the difference in the employer's decision, *i.e.*, when it is a "but-for" cause.

D. ADA Cases from Other Circuits

Despite the plain language of the ADA, its legislative history, and the Supreme Court's interpretation of identical causal language in Title VII, the defendants argue that we should nonetheless interpret "because of" to mean "solely because of." They contend that precedents from the Fourth, Fifth, Seventh, and Tenth Circuits support that interpretation, and point us to *Doe v. University of Maryland Medical Sys.*, 60 F.3d 1261 (4th Cir.1995); *Myers v. Hose*, 60 F.3d 278 (4th Cir.1995); *Rizzo v. Children's World Learning Ctrs.*, 84 F.3d 768 (6th Cir.1996); *Despears v Milwaukee County*, 63 F.3d 635 (7th Cir.1995); and *White v. York Int'l Corp.*, 45 F.3d 357 (10th Cir.1995). Even if all five of those cases from four other circuits had actually held that "because of" means "solely because of" under the ADA, we would still part company with those circuits, because we are firmly convinced that such an interpretation is contrary to the language of the statute and the intent of Congress. However, in this case, our task is made much easier by the fact that only one

of the five decisions cited by the defendants actually *held* that "because of" in the ADA context means "solely because of." The others did not.

In *University of Maryland Medical Sys.*, 50 F.3d at 1266, the Fourth Circuit affirmed summary judgment for an employer in an ADA case because the employee was not a "qualified employee with a disability" within the meaning of the ADA. Although the court stated that an ADA plaintiff is required to prove that he was-discriminated against "solely on the basis of the disability" in order to prove his case, *id.* at 1264-65, that observation is dictum. Because the court determined that the plaintiff was not a qualified employee with a disability to begin with, it was not required to, and did not purport to, examine the causal connection between the plaintiff's termination and his disability.

Similarly, in *Myers*, 50 F.3d at 282, the Fourth Circuit affirmed summary judgment for an employer in an ADA case because the employee was not a qualified individual with a disability. Although the court observed in dicta that "the substantive standards for determining liability are the same" under the ADA and the Rehabilitation Act, *id.* at 281, the court was not required to, and did not purport to, authoritatively resolve the issue that faces us today.

In *Rizzo*, 84 F.3d at 760, the Fifth Circuit reversed summary judgment in favor of an employer, because it found that a genuine question of material fact existed as to whether the plaintiff was a qualified individual with a disability. Because the defendant in that case did not deny that the plaintiff was terminated because of her disability, there were no causal connection questions in the case. *See id.* at 762. Although the court did observe that the

ADA required the plaintiff to prove that her employer took an adverse employment action "solely because of her disability," that observation has no bearing on the court's decision; it is dictum.

In *White*, 45 F.3d at 363, the Tenth Circuit affirmed summary judgment for an employer because the employee was not a qualified individual with a disability. As with the foregoing cases, the court had no occasion to consider the causal connection question at issue in this case, and it explicitly declined to address "whether York terminated [the plaintiff] solely because of his disability." *Id.* A court does not make a holding with language directed toward an issue it expressly declines to address.

To summarize, the foregoing cases do not trouble us. Although they do contain dicta that supports the defendants' position, we are not required to follow dicta contained in our own precedents, much less dicta from our sister circuits. Dicta can sometimes be useful when it contains a persuasive analysis of a particular issue, but the opinions in the foregoing cases are not even useful for that purpose, because they do not include any meaningful analysis of whether "because of" in the ADA context means "solely because of." The passing references that those cases make to the applicable causal standard shed little or no light on the question, and give us no pause.

However, *Despears v. Milwaukee County*, 63 F.3d 635 (7th Cir.1995), is more problematic. In that ADA case, the Seventh Circuit affirmed summary judgment for an employer. *Id.* at 637. In doing so, it held — not merely stated in dicta, but held — that judgment for the employer was proper, because the alleged disability was not the sole cause of the demotion in question. No extended discussion or helpful rationale is given in *Despears*

for the holding that the ADA requires a showing of sole causation. Because we believe that holding is contrary to the language of the statute, the will of Congress, and the Supreme Court's interpretation of substantially identical causal language in the Title VII context, we decline to follow it.

We hold that the "because of" component of the ADA liability standard imposes no more restrictive standard than the ordinary, everyday meaning of the words would be understood to imply. In everyday usage, "because of" conveys the idea of a factor that made a difference in the outcome. The ADA imposes a "but-for" liability standard. The contrary verdict form language is error which requires reversal. That is not the only error in the verdict form.

V. WHETHER THE VERDICT FORM ERRONEOUSLY LIMITED RECOVERY TO "TERMINATION"

According to questions five and six of the verdict form, in order for the jury to return a verdict for McNely on either his discrimination claim or his retaliation claim, the jury was required to find that McNely was "terminated" for a prohibited reason. However, the ADA protects against more than termination. It prohibits discrimination "in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." 42 U.S.C.A. § 12112(a) (West 1995); *see also id.* § 12203 (anti-retaliation provision) (prohibiting employers to "discriminate"). In other words, the ADA prohibits a broad variety of adverse employment actions, whenever those actions are taken for a prohibited reason.

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McNely's complaint alleged a variety of adverse employment actions short of his ultimate termination. Specifically, paragraphs twenty-two and twenty-three of his complaint, which were incorporated into every count, made the following allegations:

> 22. After withdrawing Plaintiff's reasonable accommodation in the Camera Department, Defendant reassigned Plaintiff to janitor's duty requiring Plaintiff to clean toilets and bathrooms, among other janitorial duties.
>
> 23. Defendant subsequently reassigned Plaintiff to the shipping and loading department, and required Plaintiff to perform loading and other physically strenuous tasks difficult or impossible for a man of Plaintiff's condition to perform.

It is undisputed that, after the 40-minute press delay in August 1993, Star-Banner reassigned McNely to the building maintenance department. It is also undisputed that after McNely complained about being assigned to the maintenance department, Star-Banner reassigned him to do clerical work, and then reassigned him once again to the distribution department. At trial, evidence about those transfers was admitted, and McNely argued to the jury that those actions were taken for a discriminatory reason. In turn, Star-Banner argued that those transfers were an attempted accommodation of McNely's medical condition. The jury instructions informed the jury that McNely could recover for "adverse employment action," defined as "action that has a negative effect on terms, privileges, or other conditions of employment, such as hiring, job assignment,

termination, granting leave, promotion and compensation." Nevertheless, over McNely's objection, the district court declined to modify the verdict form to permit recovery for adverse employment action short of termination. As a result, the verdict form was inconsistent with the ADA, with the complaint, with the evidence presented at trial, and with the jury instructions.

VI. CONCLUSION

The verdict form submitted to the jury in this case did not accurately reflect the law or the evidence presented at trial. First, the verdict form required a finding of sole causation in order for McNely to recover, while the ADA requires only a finding of "but-for" causation. Second, the verdict form barred recovery for adverse employment actions short of termination, when the ADA permits recovery for those less drastic forms of discrimination and when evidence of such lesser discrimination was presented at trial. Under these circumstances, we cannot conclude that the jurors understood the issues and were not misled by the verdict form. *See U.S. v. Starke,* 62 F.3d 1374, 1380 (11th Cir.1995) (quoting *Wilkinson v. Carnival Cruise Lines,* Inc., 920 F.2d 1660, 1669 (11th Cir. 1991)).

Therefore, we REVERSE the judgment of the district court and REMAND for a new trial.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF FLORIDA FILED AUGUST 9, 1995

United States District Court
Northern District of Florida

Docket Number
GCA 94-10057-MMP

Name of Judge or Magistrate Judge
MAURICE M. PAUL, CHIEF US JUDGE

Case Title:

BERNARD F. MCNELY

V.

OCALA STAR BANNER, NEW YORK TIMES CO

JUDGMENT IN A CIVIL CASE

☒ **Jury Verdict.** This action came before the Court and a jury with the judicial officer named above presiding. The issues have been tried and the jury has rendered its verdict.

* * *

IT IS ORDERED AND ADJUDGED

THAT THE PLAINTIFF, BERNARD MCNELY, TAKE NOTHING, THAT THE ACTION BE DISMISSED ON THE MERITS, AND THAT THE DEFENDANTS, OCALA STAR BANNER AND THE NEW YORK TIMES COMPANY,

Appendix B

RECOVER OF THE PLAINTIFF, BERNARD MCNELY, THEIR COST OF ACTION.

ROBERT A. MOSSING, CLERK August 9, 1995

By Deputy Clerk: Travis Green
s/ Travis Green

ENTERED ON DOCKET August 9, 1995 BY
(Rules 58 & 79(a) FRCP or 32(b)(1) & 55 FRCRP)

Copies mailed to:
Gallion, Langford
et al.

APPENDIX C — JURY VERDICT FILED AUGUST 8, 1995

IN THE UNITED STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF FLORIDA
GAINESVILLE DIVISION

CASE NO. GCA 94-10057-MMP

BERNARD F. McNELY,

Plaintiff,

v.

OCALA STAR-BANNER CORPORATION, and THE NEW YORK TIMES COMPANY,

Defendants.

VERDICT

WE, THE JURY, UNANIMOUSLY RETURN THE FOLLOWING VERDICT:

1. Do you find, by a preponderance of the evidence, that Plaintiff has proved that he is an "individual with a disability" within the meaning of the ADA?

Yes X No __

[If you answered "Yes" to the foregoing question, please answer question 2. If you answered "No", please answer question 6.]

2. Do you find, by a preponderance of the evidence, that Plaintiff

has proved that he was able to perform the essential functions of the position of Camera Room Night Supervisor.

Yes X No __

[If you answered "Yes" to the foregoing question, please answer question 3. If you answered "No", please answer question 6.]

3. Do you find, by a preponderance of the evidence, that Defendants have proved that they reasonably accommodated Plaintiff?

Yes __ No X

[If you answered "Yes" to the foregoing question, please answer question 6. If your answer is "No", please answer question 4.]

4. Do you find that allowing Plaintiff to work as a Camera Room Night Supervisor would have imposed an undue hardship on the Defendants?

Yes __ No X

[If you answered "Yes" to the foregoing question, please answer question 6. If your answer is "No", please answer question 5.]

5. Do you find, by a preponderance of the evidence, that Plaintiff has proved that he was terminated solely because of his alleged disability?

Yes __ No X

[If you answered "Yes" to the foregoing question, please answer question 7. If you answered "No", please answer question 6.]

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6. Do you find, by a preponderance of the evidence, that Plaintiff has proved that he was terminated solely because he engaged in a statutorily protected expression?

Yes __ No X

[If you answered "Yes" to the foregoing question, please answer question 7. If you answered "No", then your verdict is for the defendants, and you should simply date and sign this verdict form.]

7. Please set forth, in dollar amount, such compensatory damages, if any, you find from a preponderance of the evidence, Plaintiff has suffered from his termination.

$ _____

[Please answer question 8.]

8. Please set forth, in dollar amount, such punitive damages, if any, you find from a preponderance of the evidence, that should be assessed against the defendant.

$ _____

SO SAY WE ALL.

Dated this 8 day of August, 1995, in Gainesville, Florida.

s/ Peter Polshek
Foreperson

APPENDIX D — RELEVANT STATUTES

AMERICANS WITH DISABILITIES ACT OF 1990

42 U.S.C. § 12101

§ 12101. Findings and purposes

(a) Findings

The Congress finds that —

(1) some 43,000,000 Americans have one or more physical or mental disabilities, and this number is increasing as the population as a whole is growing older;

(2) historically, society has tended to isolate and segregate individuals with disabilities, and, despite some improvements, such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem;

(3) discrimination against individuals with disabilities persists in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and access to public services;

(4) unlike individuals who have experienced discrimination on the basis of race, color, sex, national origin, religion, or age, individuals who have experienced discrimination on the basis of disability have often had no legal recourse to redress such discrimination;

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(5) individuals with disabilities continually encounter various forms of discrimination, including outright intentional exclusion, the discriminatory effects of architectural, transportation, and communication barriers, overprotective rules and policies, failure to make modifications to existing facilities and practices, exclusionary qualification standards and criteria, segregation, and relegation to lesser services, programs, activities, benefits, jobs, or other opportunities;

(6) census data, national polls, and other studies have documented that people with disabilities, as a group, occupy an inferior status in our society, and are severely disadvantaged socially, vocationally, economically, and educationally;

(7) individuals with disabilities are a discrete and insular minority who have been faced with restrictions and limitations, subjected to a history of purposeful unequal treatment, and relegated to a position of political powerlessness in our society based on characteristics that are beyond the control of such individuals and resulting from stereotypic assumptions not truly indicative of the individual ability of such individuals to participate in, and contribute to, society;

(8) the Nation's proper goals regarding individuals with disabilities are to assure equality of opportunity, full participation, independent living, and economic self-sufficiency for such individuals; and

(9) the continuing existence of unfair and unnecessary discrimination and prejudice denies people with disabilities the opportunity to compete on an equal basis and to pursue those opportunities for which our free society is justifiably famous, and costs the United States billions of dollars in unnecessary expenses resulting from dependency and nonproductivity.

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(b) Purpose

It is the purpose of this chapter —

(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;

(2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;

(3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and

(4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

* * *

42 U.S.C. § 12111

§ 12111. Definitions

As used in this subchapter:

* * *

(8) **Qualified individual with a disability**

The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable

accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

* * *

42 U.S.C. § 12112

§ 12112. Discrimination

(a) General rule

No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.

(b) Construction

As used in subsection (a) of this section, the term "discriminate" includes —

* * *

(5)(A) not making reasonable accommodations to the known physical or mental limitations of an otherwise qualified

individual with a disability who is an applicant or employee, unless such covered entity can demonstrate that the accommodation would impose an undue hardship on the operation of the business of such covered entity; or

* * *

42 U.S.C. § 12112(d)

(d) Medical examinations and inquiries

(1) In general

The prohibition against discrimination as referred to in subsection (a) of this section shall include medical examinations and inquiries.

(2) Preemployment

(A) Prohibited examination or inquiry

Except as provided in paragraph (3), a covered entity shall not conduct a medical examination or make inquiries of a job applicant as to whether such applicant is an individual with a disability or as to the nature or severity of such disability.

(B) Acceptable inquiry

A covered entity may make preemployment inquiries into the ability of an applicant to perform job-related functions.

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(3) Employment entrance examination

A covered entity may require a medical examination after an offer of employment has been made to a job applicant and prior to the commencement of the employment duties of such applicant, and may condition an offer of employment on the results of such examination, if —

(A) all entering employees are subjected to such an examination regardless of disability;

(B) information obtained regarding the medical condition or history of the applicant is collected and maintained on separate forms and in separate medical files and is treated as a confidential medical record, except that —

(i) supervisors and managers may be informed regarding necessary restrictions on the work or duties of the employee and necessary accommodations;

(ii) first aid and safety personnel may be informed, when appropriate, if the disability might require emergency treatment; and

(iii) government officials investigating compliance with this chapter shall be provided relevant information on request; and

(C) the results of such examination are used only in accordance with this subchapter.

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(4) Examination and inquiry

(A) Prohibited examinations and inquiries

A covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.

(B) Acceptable examinations and inquiries

A covered entity may conduct voluntary medical examinations, including voluntary medical histories, which are part of an employee health program available to employees at that work site. A covered entity may make inquiries into the ability of an employee to perform job-related functions.

(C) Requirement

Information obtained under subparagraph (B) regarding the medical condition or history of any employee are subject to the requirements of subparagraphs (B) and (C) of paragraph (3).

42 U.S.C. § 12113

§ 12113. Defenses

(a) In general

It may be a defense to a charge of discrimination under this chapter than an alleged application of qualification standards, tests, or selection criteria that screen out or tend to screen out or

otherwise deny a job or benefit to an individual with a disability has been shown to be job-related and consistent with business necessity, and such performance cannot be accomplished by reasonable accommodation, as required under this subchapter.

(b) Qualification standards

The term "qualification standards" may include a requirement that an individual shall not pose a direct threat to the health or safety of other individuals in the workplace.

* * *

42 U.S.C. § 12117

§ 12117. Enforcement

(a) Powers, remedies, and procedures

The powers, remedies, and procedures set forth in sections 2000e-4, 2000e-5, 2000e-6, 2000e-8, and 2000e-9 of this title shall be the powers, remedies, and procedures this subchapter provides to the Commission, to the Attorney General, or to any person alleging discrimination on the basis of disability in violation of any provision of this chapter, or regulations promulgated under section 12116 of this title, concerning employment.

(b) Coordination

The agencies with enforcement authority for actions which allege employment discrimination under this subchapter and under the Rehabilitation Act of 1973 [29 U.S.C.A. § 701 et seq.]

shall develop procedures to ensure that administrative complaints filed under this subchapter and under the Rehabilitation Act of 1973 are dealt with in a manner that avoids duplication of effort and prevents imposition of inconsistent or conflicting standards for the same requirements under this subchapter and the Rehabilitation Act of 1973. The Commission, the Attorney General, and the Office of Federal Contract Compliance Programs shall establish such coordinating mechanisms (similar to provisions contained in the joint regulations promulgated by the Commission and the Attorney General at part 42 of title 28 and part 1691 of title 29, Code of Federal Regulations, and the Memorandum of Understanding between the Commission and the Office of Federal Contract Compliance Programs dated January 16, 1981 (46 Fed.Reg. 7435, January 23, 1981)) in regulations implementing this subchapter and Rehabilitation Act of 1973 not later than 18 months after July 26, 1990.

* * *

42 U.S.C. § 12201

§ 12201. Construction

(a) In general

Except as otherwise provided in this chapter, nothing in this chapter shall be construed to apply a lesser standard than the standards applied under title V of the Rehabilitation Act of 1973 (29 U.S.C. 790 et seq.) or the regulations issued by Federal agencies pursuant to such title.

* * *

Appendix D

REHABILITATION ACT OF 1973

29 U.S.C. § 701

GENERAL PROVISIONS

§ 701. Findings; purpose; policy

(a) Findings

Congress finds that —

(1) millions of Americans have one or more physical or mental disabilities and the number of Americans with such disabilities is increasing;

(2) individuals with disabilities constitute one of the most disadvantaged groups in society;

(3) disability is a natural part of the human experience and in no way diminishes the right of individuals to —

(A) live independently;

(B) enjoy self-determination;

(C) make choices;

(D) contribute to society;

(E) pursue meaningful careers; and

(F) enjoy full inclusion and integration in the economic, political, social, cultural, and educational mainstream of American society;

(4) increased employment of individuals with disabilities can be achieved through the provision of individualized training, independent living services, educational and support services, and meaningful opportunities for employment in integrated work settings through the provision of reasonable accommodations;

(5) individuals with disabilities continually encounter various forms of discrimination in such critical areas as employment, housing, public accommodations, education, transportation, communication, recreation, institutionalization, health services, voting, and public services; and

(6) the goals of the Nation properly include the goal of providing individuals with disabilities with the tools necessary to —

(A) make informed choices and decisions; and

(B) achieve equality of opportunity, full inclusion and integration in society, employment, independent living, and economic and social self-sufficiency, for such individuals.

(b) Purpose

The purposes of this chapter are —

(1) to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society, through —

(A) comprehensive and coordinated state-of-the-art programs of vocational rehabilitation;

(B) independent living centers and services;

(C) research;

(D) training;

(E) demonstration projects; and

(F) the guarantee of equal opportunity; and

(2) to ensure that the Federal Government plays a leadership role in promoting the employment of individuals with disabilities, especially individuals with severe disabilities, and in assisting States and providers of services in fulfilling the aspirations of such individuals with disabilities for meaningful and gainful employment and independent living.

(c) Policy

It is the policy of the United States that all programs, projects, and activities receiving assistance under this chapter shall be carried out in a manner consistent with the principles of —

(1) respect for individual dignity, personal responsibility, self-determination, and pursuit of meaningful careers, based on informed choice, of individuals with disabilities;

(2) respect for the privacy, rights, and equal access (including the use of accessible formats), of the individuals;

Appendix D

(3) inclusion, integration, and full participation of the individuals;

(4) support for the involvement of a parent, a family member, a guardian, an advocate, or an authorized representative if an individual with a disability requests, desires, or needs such support; and

(5) support for individual and systemic advocacy and community involvement.

* * *

29 U.S.C. § 794

§ 794. Nondiscrimination under Federal grants and programs

(a) Promulgation of rules and regulations

No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect

no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

* * *

(d) Standards used in determining violation of section

The standards used to determine whether this section has been violated in a complaint alleging employment discrimination under this section shall be the standards applied under title I of the Americans with Disabilities Act of 1990 (42 U.S.C. 12111 et seq.) and the provisions of sections 501 through 504, and 510, of the Americans with Disabilities Act of 1990 (42 U.S.C. 12201-12204 and 12210), as such sections relate to employment.

TITLE VII OF THE CIVIL RIGHTS OF 1964, AS AMENDED

42 U.S.C. § 2000e-2

§ 2000e-2. Unlawful employment practices

(a) Employer practices

It shall be an unlawful employment practice for an employer —

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

* * *

Supreme Court, U.S.
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No. 96-1318

In The

Supreme Court of the United States

October Term, 1996

OCALA STAR-BANNER CORPORATION AND
THE NEW YORK TIMES COMPANY,

Petitioners,

vs.

BERNARD F. McNELY,

Respondent.

Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Petitioners seek certiorari appeal by asserting a purported conflict among the Circuits and the existence of an important question of law pertaining to the Americans With Disabilities Act ("ADA") in this cause. In fact, neither criteria is satisfied. Rather, the decision of the Eleventh Circuit Court of Appeals below regarding the *prima facie* elements for satisfying a claimant's burden of proof under the ADA involves no articulated conflict among the Circuits and fails to constitute an important question for this Court. Had any other Circuit Court undertaken to analyze and articulate the liability standard for prevailing under the terms of the ADA, a conflict would arguably exist. Had the Eleventh Circuit opted to insert the restrictive term "solely" regarding the liability standard as advocated by Petitioners contrary to the expressed intent of Congress, then an important question of law would arguably exist. Instead, the Eleventh Circuit below merely analyzed and articulated the liability standard applicable to the Americans With Disabilities Act consistent with the language of the statute and the intent of Congress. Therefore, certiorari appeal is unwarranted.

As set forth in the opinion of the Eleventh Circuit below (Petition, App. A), Title I of the ADA, which applies to the private sector, provides for the elimination of disability-based discrimination as follows:

> No covered entity shall discriminate against a qualified individual with a disability *because of* the disability of such individual . . .

42 U.S.C.A. §12112(a) (emphasis added). Title II of the ADA, which applies to public sector employment, likewise contains the parallel provision that states:

> Subject to the provisions of this subchapter, no qualified individual with a disability shall, *by reason of* such disability, . . .

Id. §12132 (emphasis added).

Furthermore, the ADA seeks to eliminate retaliation by private employers against employees who assert their statutory rights against disability-based discrimination as follows:

> No person shall discriminate against any individual *because* such individual has opposed any act or practice made unlawful by this chapter . . .

Id. §12203(a) (emphasis added).

None of the foregoing provisions contain the word "solely" or any other similar restrictive term. As with any other statute, an appropriate analysis of the ADA must begin with the plain language of the statute itself. *See Shaw v. Delta Airlines*, 463 U.S. 85, 97, 103 S.Ct. 2890, 2900, 77 L. Ed. 2d 490 (1983). As referenced in the Petition and by the Eleventh Circuit Court of Appeals below, the legislative history of the House Committee Report explained the decision to leave "solely" out of Title II as follows:

> The Committee recognizes that the phrasing of §202 in this legislation differs from §504 [of the Rehabilitation Act] by virtue of the fact that the phrase "solely by reason of his or her handicap" has been deleted. The deletion of this phrase is supported by the experience of the executive

> agencies charged with implementing §504 . . . A literal reliance on the phrase "solely by reason of his or her handicap" leads to absurd results . . .

H.R. Rep. No. 485 (II), 101st Cong., 2nd Sess., at 85 (1990). The Senate Committee Report contains a virtually identical passage. *See*, S. Rep. No. 116, 101st Cong., 1st Sess., at 44-45 (1989).

Contrary to the plain language of this statute, the Petitioners request that this Court insert, *judicially*, a critical restrictive term that was expressly deleted, *legislatively*. If the Eleventh Circuit Court of Appeals upon its careful analysis had agreed to jettison the plain language of the statute and its legislative history and insert judicially the restrictive term "solely" to the liability standard applicable to the ADA, then perhaps an "important question" would be ripe for review by this Court. However, because the Eleventh Circuit merely interpreted the ADA consistent with its plain language and legislative history no significant or important question arises from its ruling in favor of Respondent below.

Similarly, Petitioners contend that the Eleventh Circuit's ruling below creates a conflict within the circuits, but can cite to no other circuit that has analyzed and articulated the liability standard applicable to a claim of discrimination under the ADA. In fact, the cases cited by Petitioners either reference the term "solely" in dicta without comment or application to the issues on appeal, or acknowledge the language of the ADA that expressly authorizes a departure from the Rehabilitation Act within the framework of the ADA. Notably, §12201 (a) states:

> *Except as otherwise provided in this chapter,* nothing in this chapter shall be construed to apply a lesser standard than the standards applied under Title V of the Rehabilitation Act of 1973 or the regulations issued by Federal agencies pursuant to such Title.

42 U.S.C. §12201(a) (emphasis added). *See also, Vande Zande v. State of Wisconsin, Department of Administration,* 44 F.3d 538, 541 (7th Cir. 1995) (Rehabilitation Act can be consulted for clues to the meaning of the "same terms" in the new ADA law); *Myers v. Hose,* 50 F.3d 278, 281 (4th Cir. 1995) (noting that the ADA codified "much of" the case law and the implementing regulations of the Rehabilitation Act); *Monette v. Electronic Data Systems Corporation,* 90 F.3d 1173 (5th Cir. 1996) (analysis of claims under the ADA "roughly parallels" those brought under the Rehabilitation Act); *compare, House of Representatives Committee Report,* H.R. Rep. 101-485, Pt. 3, 101st Cong., 2d Sess., at 32 (1990) (the ADA borrows "much of its substantive framework" from §504 of the Rehabilitation Act of 1973).

As noted by the Eleventh Circuit, none of the Circuit Court cases referenced by Petitioners constitute a *bona fide* conflict among the circuits with respect to the liability standard applicable to the ADA. In fact, only one of the five decisions cited by the Petitioners below actually held that "because of" in the ADA context means "solely because of". However, the case of *Despears v. Milwaukee County,* 63 F.3d 635 (7th Cir. 1995), did not present any extended discussion or analysis in support of its cursory application of the "solely" standard applicable to the ADA liability standard. The absence of any articulated

analysis or express ruling regarding the applicable standard indicates that *Despears* fails to constitute a "real" or "embarrassing" conflict of opinion and authority between courts of appeal. *See, Rice v. Sioux City Memorial Park Cemetery,* 349 U.S. 70, 75 S.Ct. 614, 99 L. Ed. 897 (1955). As such, until a Circuit Court judicially alters the standard of liability under the ADA by expressly *adding and applying* the term "solely" into the ADA framework, no "important question" exists sufficient to warrant appeal to this Court. Similarly, until such time as a Circuit Court conflicts expressly with the Eleventh Circuit's careful analysis of the plain language and legislative history of the ADA regarding this issue, no conflict exists sufficient to warrant an appeal to this Court.

CONCLUSION

The Eleventh Circuit Court of Appeals' decision in this case has failed to create a justiciable conflict among the Circuits or an important question of law warranting resolution by this Court and the Petition should be denied accordingly.

Respectfully submitted,

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